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No. 1267

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

MANUEL VACA et al. AS OFFICERS AND MEMBERS OF NATIONAL BROTHERHOOD OF PACKINGHOUSE WORKERS,
Petitioners,

vs.

NILES L. SIPES, AS ADMINISTRATOR OF THE ESTATE OF BENJAMIN OWENS, JR., DECEASED,
Respondent.

RESPONDENT'S ANSWER BRIEF TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS ACTUALLY PRESENTED BY THE CASE

1. Does a State Court have jurisdiction to entertain an action by a member against a Union for actual and punitive damages, based upon pleading and proof (not based upon discrimination) that the Union, as the member's representative, breached a collective bargaining agreement

with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth arbitration step of a grievance procedure set forth in the bargaining agreement (see opinion, last paragraph, of Supreme Court of Missouri, page 49, of Petitioner's Appendix A)?

2. Does federal law authorize a State court to award damages against the Union under the circumstances in question 1, upon a showing of arbitrary action, done with legal malice, where the petition sought actual and punitive money damages, for breach of contract, but did not request specific performance by an order to arbitrate or to restore the employee to his job?

STATEMENT SUPPLEMENTAL TO PETITIONERS'

For patent economic reasons, respondent, as administrator for the family of Benjamin Owens, Jr., is unable to furnish the Court with re-prints of the two briefs of this respondent, in the Kansas City Court of Appeals, as utilized in the Supreme Court of Missouri, but attaches available copies hereto and incorporates the Statement therein, by reference. Petitioners, of course, have copies thereof.

Additionally, respondent requests this Court to consider the Statement of Facts made by the Supreme Court of Missouri in its opinion as adopted by respondent; this should be supplemented by the evidence in the transcript of record, from the trial court, that, according to petitioners' witness, Jamerson (the Union's business representative), the sixteen man Executive Board of the Union voted to go on to arbitration, and that Jamerson agreed that Owens' grievance was meritorious (Transcript, pages 158, 161, 162,

163; the record as certified by the Clerk of the Supreme Court of Missouri is not available to respondent, so that page numbers cannot be given; however, pertinent excerpts commence at the 14th question before the close of the direct examination of Jamerson, by petitioners' counsel), as follows:

"Q. (By Mr. Panethiere) Then you moved that they take it to the fifth step, and you had a second.

A. Yes.

Q. Did you have a vote on it?

A. Oh, yes.

Q. What was the result of the vote, Mr. Jamerson?

A. To go, to take it on to the fifth step."

And commencing with cross-examination, this occurred:

"Q. And you thought he was right, didn't you, Mr. Jamerson?

A. Thought Ben was right by telling me that?

Q. No, no, of course, by saying that, but I am talking about that he should have been taken to the fifth step to give him a chance to present his case, didn't you? You favored that, didn't you?

A. Yes, I was representing him."

It should also be added that the employee had worked for Swift & Co. 16 years when discharged, and was eligible for a pension after 20 years (Transcript, pages 21, 28, 219).

Any demand of the local President, Vaca, if made, for $300.00, as a prelude to action into arbitration was termed "outrageous" and "improper", by Union officials (Transcript, pages 173, 213). The $300.00 demand was not dropped out of the case, as petitioners claim, page 4, but was prominently discussed in the Missouri Supreme Court opinion on pages 41 and 42 and in the Kansas City Appeals opinion, page 31.

Union National Vice President, Kobett, during the time before he switched from favoring Owens' case, said that he belittled one of the two doctors who backed the employer (as against 6 for Owens), because the doctor had never seen Owens, but that sometimes as to a fact in issue, the Union "might twist it around a little bit—" (Transcript, pages 236, 242). Kobett admitted that the decision as to continuing to arbitration is an inside process in the internal workings of the Union and it was so decided (Transcript, pages 231, 232); that he felt that Owens case had merit to be processed through the four steps where the company officials decided it, but not through the neutral arbitrator (Transcript, page 233); that it was the Union's duty in matters involving grievances of employees against their employer to represent them faithfully (Transcript, page 189), to do all it can to work for the employee (Transcript, pages 190, 204), and to help the employee when his and management's interests conflict (Transcript, page 165).

The petitioners did not claim that the Union had anything to do with getting Owens discharged (Transcript, page 73). However, as to the feeling in connection with the Union clandestinely withdrawing Owens' grievance in the fourth step, Vaca testified (though he later attempted to recant), that the Union was entitled to withdraw the grievance in retaliation for Owens suing it (Transcript, pages 218, 219).

Before Owens commenced the instant action, he sought a ruling from the National Labor Relations Board, and received this ruling, dated September 16, 1960 (see K. C. Appeals opinion, page 21 of petitioners' Appendix):

"* * * *if it can be shown that a labor organization caused, or attempted to cause, an employer to discriminate against an employee* in violation of Section 8(a)(3) for some rea-

son other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation."

In the fourth step, Owens' grievance against the employer was "withdrawn" by the Union about one month before the trial, without consent of, or presence of, or notification to Owens (Petitioners' Statement, p. 8, Transcript, pages 10, 198, 199, 201, 202, 235).

The medical reports from six doctors for Owens and two for the petitioners were admitted in evidence (Petitioners' Appendix 50).

REASONS FOR DENYING THE WRIT

1. Does a State Court have jurisdiction to entertain an action by a member against a Union for actual and punitive damages, based upon pleading and proof (not based upon discrimination) that the Union, as the member's representative, breached a collective bargaining agreement with the employer, of which the members were beneficiaries, by arbitrarily and without just cause or excuse (and thus with legal malice), refusing to carry the member's grievance against the employer through the fifth, arbitration, step of a grievance procedure set forth in the bargaining agreement (see opinion, last paragraph, of Supreme Court of Missouri, page 49, of Petitioners' Appendix A)?

Notwithstanding the effort by petitioners and the offering by amicus curiae, the employer (strange bedfellows!), to build this simple case of arbitrary and legally malicious breach of contractual duty to represent Owens, as his agent, into a colossal, nationshaking Frankenstein, which would destroy America's labor-management procedure, paralyze industry, etc., the matter is no more than an uncomplicated occurrence which would never even have

reached the Supreme Court of Missouri had not the judges of the intermediate appellate court divided in their opinions. The seven members of the Court *en banc* of the Supreme Court of Missouri entertained no doubt as to the jurisdictionally and otherwise sound bases of the verdict for Benjamin Owens, Jr.

No discrimination was pleaded, proved, or submitted. The subject-matter involved an arbitrary decision, presumably by the petitioners' officers (against the vote of the Executive Board and by reason of failure of Owens to pay the $300.00 "lug" to the local president, and in retaliation for this suit—clandestine dismissal of Step 4—as the jury may be considered to have found—not to pursue to the Fifth (arbitration) Step, a grievance for Owens, which they had, through the hearing in the Fourth Step, claimed was meritorious. Five doctors favored Owens, two (one of whom had never seen him and the other of whom was the Company doctor) were for the employer. The officers would give Owens no information as to the status, if any, of his grievance.

This is the milieu in which Owens first queried the National Labor Relations Board as to his forum for relief. They declined to take jurisdiction, unless discrimination was in the case, under Section 8(a)(3); of such discrimination, of course, there is no inkling in the evidence—no other employee nor the rights of anyone but Owens, were involved. This was purely an arbitrary action (since contrary to the vote of the Executive Board), an "outrageous" and improper demand for money, and a legally malicious breach of the faith due from an agent to its principal, Owens (who had a strong grievance, but was blocked by clandestine and retaliatory Union action).

Jurisdiction in the National Labor Relations Board, under these facts, being declined by that body, and want of such jurisdiction clearly appearing, Owens resorted to the only available forum, the State Court (there was no diversity, so even if Owens had sued for more he could not have gone to the federal court). The National Labor Relations Board could not have awarded him punitive damages in any event; and he was not asking for specific performance by restoration, in the breach of contract action, but solely for money damages, actual and punitive.

After full and careful consideration of all issues presented, jurisdiction being the principal and possibly the only serious one, the Supreme Court of Missouri properly tagged the case for what it was—a breach of contract action, not involving any unfair, discriminatory labor practice, but based upon arbitrary and malicious failure to process Owens' grievance under the contract, by internal Union action.

The answer to Respondent's question 1, therefore, must be affirmative—the State Court had jurisdiction. And the answer to question 2 logically follows as affirmative.

This Court has never in any case, laid out or said that it should lay out a detailed listing of facts, like a logarithm table, as petitioners seek, from which a clerk, or labor representative, or personnel man, or an IBM machine could check or insert the facts in question and receive a detailed and exact answer from the table. Instead, it has considered its function to be to lay out broad guidelines from which local courts by "litigating elucidation" will decide detailed issues; this Court deals only with "classes of situations", *San Diego* v. *Garmon*, 359 U.S. 236, 241, 242. It will only interfere with a subordinate body when

the exercise of state power threatens interference with a "clearly indicated policy of industrial relations", but will not interfere where an activity is "a merely peripheral concern" of the LMR Act, page 243, *San Diego*, citing *Gonzales; post.*

The latest pronouncement of this Court, on the pre-emption question, known to respondent, is *Linn* v. *United*, 86 S. Ct. 657, February 21, 1966.

Here, it was held that the National Labor Relations Board did not have exclusive jurisdiction of a libel suit based upon defamation of a Company Manager, by a Union, during a labor campaign. *Malice,* of course, was charged and was important in the decision (and this is true in the Owens case). Federal jurisdiction was based upon diversity.

A facet, important in the present climate, was that the National Labor Relations Board could not give complete relief (*e.g.* damages, *penalty*—punitive damages, etc.), but the State Court could do so. The argument (a twin to that advanced herein) that huge, dire and disastrous sequelae would flow from State jurisdiction was rejected by the Court. And the opinion reiterated that States need not yield jurisdiction where the matter is a "merely peripheral concern of LMRA", p. 661, citing *Garmon, supra,* and quoting *Garner, post;* and it quotes *LaBurnum, post,* approvingly, to the effect that State procedures survive if they are *not in conflict* with federal. The opinion likewise approves the pronouncement in *Russell, post,* which upheld State jurisdiction in an action for compensation and *punitive* damages for malicious interference with a lawful occupation, page 663.

The Supreme Court of Missouri properly leaned heavily, in the decision, upon *Gonzales*, 356 U.S. 617, and *Russell*, 356 U.S. 634. Respondent, to save the Court duplicate reading, will not repeat those studied comments.

There is much more, in the law, in fact. Respondent's two briefs to the Kansas City Court of Appeals, to which respondent hopes this Court will refer, discuss a number of cases in more detail than is practicable here. Among these are cases from the Supreme Court of Missouri, from subordinate federal courts, from the National Labor Relations Board, and from fifteen State Courts, affirming jurisdiction in State Courts, in situations similar to the instant one. This is the process of "litigating elucidation" of the details involved in various facets of the broad guidelines *already provided* by this Court.

In *International* v. *Gonzales*, 356 U.S. 617 (1957), this Court said that the "protection of Union members in their *contractual rights* as members from arbitrary conduct by Unions and Union officers has *not* been *undertaken by Federal law*, and indeed, the assertion of any such power has been expressly denied" (page 620, emphasis added). This Court held that this was so, *even though an unfair labor practice* might be involved and even though the National Labor Relations Board could also award damages. It added, page 621, that "a *State remedy* for *breach of contract* also *ought not be displaced by such* evidentiary coincidence (between the breach and a NLRB complaint) * * *" (emphasis supplied). The subject matter of *Gonzales* dealt with arbitrariness and misconduct of the Union against its member, page 622. This Court said: "the State Court proceedings deal with *arbitrariness* and *misconduct* vis-a-vis the individual Union Members and the Union; the *Board* proceeding, looking principally to

the *nexus* between *Union Action* and *employer discrimination* examines the ouster from membership in entirely *different terms*." (pages 622, 623; emphasis added). No such nexus was pleaded, proved or submitted in the present case.

This Court has never narrowed or rejected the above guidelines and they are the law today. In fact, you have several times referred to the *Gonzales* case approvingly. The *Owens* case is well within the limits of that yardstick.

The opinion in *International* v. *Russell*, 356 U.S. 634, reminded us that even though the NLRB could award backpay, it could not grant punitive damages, and that, notwithstanding that an unfair labor practice might be involved, the State jurisdiction to award actual and punitive damages as to tortious conduct of a labor union was not pre-empted from an Alabama Court.

Thereafter, in the case of *Dowd* v. *Courtney*, 368 U.S. 502, this Body reiterated principles enunciated by Mr. Justice Frankfurter in *Gonzales* when it held that the Labor Management Relations Act *does not divest State Courts* of jurisdiction for violation of *bargaining contracts*. This Court emphasized the basis of this country's juridical foundation when it quoted, with approval, the Massachusetts Supreme Judicial Court, as follows: "In the absence of a *clear* holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own Courts" (emphasis added). In the opinion, the *Dowd* case significantly stated, p. 507: "exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." No

such "clear holding" has been made, but rather, the reverse, in *Gonzales*, as to arbitrariness and misconduct—the situation in the Owens case. The *Dowd* case further emphasized that a remedy for breach of a bargaining contract lies only in the Courts.

Hard on the heels of *Dowd*, came *Local 174* v. *Lucas*, 369 U.S. 95, two weeks later, on March 5, 1962, with a similar holding, citing *Dowd*. It guaranteed uniformity of holdings in the State courts, additionally, by announcing the requirement that federal law would apply in the State Court hearings (cf. FELA cases).

Humphrey v. *Moore*, 375 U.S. 335 (January 6, 1964), also approved and cited doctrine in the *Dowd* case. It was originated in an action in the Kentucky State Court to enforce a collective bargaining contract, p. 341. This Court held that federal law is to be applied in the State Court and that the procedure was not pre-empted, adding that the Union admitted that even though employees were attempting to "maintain suits against their representatives, when the latter hostilely discriminated against them" (citing *Ford* v. *Huffman*, 345 U.S. 330), jurisdiction was not pre-empted by the NLRB, p. 344. This Court held that State court jurisdiction was not withdrawn in an action for breach of a bargaining contract. (the Owens case charges this).

Smith v. *Evening News*, 371 U.S. 195, October 10, 1962, had been announced more than a year before the *Humphrey* case. It was an opinion also concerned with *breach of a bargaining contract*; an employee sued his employer in a Michigan State Court. This Court cited *Dowd, supra*, as refusing to apply the pre-emption doctrine, and adopted the same course, even though the facts concededly involved an unfair labor practice and discrimination, and though

it was urged that the wrongful conduct was arguably under NLRA. This Court held that authority under Sec. 301 is not necessarily exclusive, stating, page 198, footnote 6, that the National Labor Relations Board agrees; it was declared that should any conflicts occur, they will be dealt with then.

In late January of last year, in *Republic* v. *Maddox*, 379 U.S. 650, this Court reversed because of the failure of an employee, suing his employer in the Alabama State Courts, first to exhaust his administrative remedies. In connection with the question of pre-emption of remedies, however, it renewed the earlier criteria for pre-emption, enumerating such matters, page 657, footnote 14, as the scope of possible review from monetary awards, and "the *ability* of the *Board* to give the *same remedies* as could be obtained by *Court* suit" (emphasis added). (Owens could not get punitive damages before the NLRB).

Earlier cases had laid the ground-work for these clear guidelines, for fair representation standards—utilized by the Supreme Court of Missouri in the instant case—internal union action, breach of contract, arbitrariness and misconduct, *Gonzales, supra,* and malice, *Linn, supra,* which petitioner imaginatively dubs, p. 11, as productive of "conflict and confusion."

TWA v. *Koppal,* 345 U.S. 653, June 1, 1953, was an action based jurisdiction-wise upon diversity. While the employee was denied relief by reason of failure to exhaust his administrative remedies (which Owens was trying to do), this Court recognized that a discharged employee of a carrier may resort to a State recognized cause of action for wrongful discharge, even though the matter could come under the Railway Labor Act, pp. 660, 661.

This was followed by the "old faithful" of pre-emption learning—*United* v. *LaBurnum*, 347 U.S. 656, June 7, 1954 (cited approvingly in *Linn, supra*). Here, a case, originating in a State Court in Virginia, resulted in a jury verdict for a corporation against three unions, for actual and punitive damages. Jurisdiction of the State court was upheld, even though the act complained of constituted also an unfair labor practice under Sec. 8, LMRA. A strike had been threatened if employees did not join a union. The action was laid in tort for damages.

In *LaBurnum*, it was declared that only *conflicting* state procedures were excluded and held, p. 663: "Here *Congress* has neither *provided* nor suggested any *substitution* for the traditional *State Court* procedure for collecting damages for injuries caused by *tortious* conduct. For us to cut off the injured respondent from this right of recovery will *deprive* it of its *property without recourse* or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct." (emphasis added).

The Pennsylvania Court of Common Pleas, in *Chiappazzi* v. *Machinists*, 48 Labor Cases, Sec. 50949, page 6387, followed these guidelines under facts which almost exactly parallel the instant ones (except they lack the strong evidence of arbitrariness and malice of the Union officers in the breach of contract in the Owens matter). The Court held that it had jurisdiction in this action for breach of contractual obligation, against a Union to act properly, in good faith, under the Union Agreement, to process an employee's grievance by presenting it to NLRB.

The following additional favorable cases, to similar effect, will be cited, but not discussed; they are presented in this respondent's briefs filed in the State Courts:

Giba v. *International*, 205 F. Supp. 553, 556 (1962); *Grumwald-Marx* v. *Los Angeles*, 343 P.2d 23, 32 (Cal. 1959); *Narens* v. *Campbell*, 347 S.W.2d 204 (Mo. Sup.); *State* v. *Local*, 317 S.W.2d 309, 321 (Mo. Sup. *banc*); *Bailer* v. *Local*, 161 A.2d 343 (Penn.); *Mahoney* v. *Sailors*, 275 P.2d 440, *cert. den.* (Wash.); *McCarroll* v. *L. A. Council*, 315 P.2d 322, *cert. den.* (Cal. 1957); *NLRB* v. *Local 294, Teamsters*, 317 F.2d 746 (C.A. N.Y. 1963); *International* v. *Superior*, 296 P.2d 395 (Cal.); *Denver* v. *Shore*, 287 P.2d 267 (Colo.); *NLRB* v. *Miranda*, 326 F.2d 172 (C.A. 2, N.Y., 1963, referred to by petitioner here) and stating p. 180: "The *machinery* of the *Board* and the remedies applied in the enforcement of unfair labor practices, as defined in the Act, are *not suited* to the task of deciding general questions of private wrongs"—(emphasis added); *NLRB* v. *Local*, 317 F.2d 746; *Gilbert* v. *Hoisting Local*, 384 P.2d 136, *cert. den.* (Ore. 1963); *NLRB* v. *Murray*, 326 F.2d 509 (C.A. 6, Tenn. 1964); *International* v. *Shawnee*, 224 F. Supp. 347 (U.S. D.C. Okla. 1963); *NLRB* v. *Symons*, 328 F.2d 835 (C.A. 7, Ill. 1964); *Fingar* v. *Seaboard*, 277 F.2d 698 (C.A. 5); *Radio* v. *Local 780*, 48 Labor Cases (L. C.), Sec. 18716 (Fla. Dist. Ct. of Appeals, 160 So.2d 150); *Humphrey* v. *Thyer*, 48 Labor Cases, Sec. 50947 (U.S. D.C. Miss. 1963); *Tecumseh* v. *WERB*, 49 L. C. 51043 (3/6/64 Wisc.); *Guzzo* v. *Steelworkers*, 47 LRRM 2379 (Cal. Superior).

AS TO CASES CITED BY PETTTIONERS

Petitioners cite, as assertedly helpful to them, a number of cases. In those mentioned hereafter, however, support for respondent's position appears, as there set forth, or the cases are distinguishable readily:

Humphrey v. *Moore*, 375 U.S. 335. This Court held, note 6, p. 344, as to a claim that the State Court was without jurisdiction of a suit to enjoin dovetailing seniority in a

merger: "Since in our view the *complaint* here charged a *breach* of *contract*, we find no merit in this position" (emphasis added).

Steele v. *L & N*, 323 U.S. 192, cert. to Ala. Sup. Courts have jurisdiction and a duty to afford a remedy for damages for breach of a statutory duty by a Union to represent its members fairly, impartially, and in good faith, without hostile discrimination. Remanded to State Court to proceed with the case.

Ford v. *Huffman*, 345 U.S. 330. An employee's representative must act in "complete good faith and honesty of purpose."

San Diego v. *Garmon*, 359 U.S. 236 (4/20/59), cert. to Sup. Ct. Cal. This Court deals only "with classes of situations", p. 242, and p. 243; it only interferes with a state court when the exercise of its power threatens interference with a "clearly indicated policy of industrial relations," and not where the activity was a "merely peripheral concern of LMRA."

International v. *O'Brien*, 339 U.S. 454, State legislation in the field of LMRA is proper, unless it conflicts with federal law.

Knox v. *International*, 223 F. Supp. 1009, bases its decision on the NLRB *Miranda* decision, which was reversed by the Court of Appeals. The case was based upon discrimination by a Union.

Stout v. *Construction*, 226 F. Supp. 673, involved race discrimination.

Cosmark v. *Struthers*, 194 A.2d 325 (Penn.), p. 328, excepts internal Union matters from those it views as preempted.

Webster v. *Midland*, 193 N.E.2d 212 (Ill.), involved and was decided upon an exhaustion of remedies failure; its *obiter* concerning pre-emption was so much of an "in addition" that it was not even headnoted.

Young v. *United*, 216 A.2d 500. No breach of contract alleged.

Hiller v. *Liquor Union*, 338 F.2d 778 (C.A. 2). Held Union liable in court action for denial of right of fair representation.

Freedman v. *National*, 347 F.2d 167 (C.A. 2, 1965). Seaman sued Union for refusal to process grievance; jurisdiction supported, citing *Humphrey* v. *Moore*.

Wheatley v. *International*, 387 P.2d 555, Utah, involved a suit by a member against a Union for *negligent* failure to represent him properly; since he conceded discharge for good cause, the Court dismissed the case on the merits—but not for jurisdictional reasons.

In *Moore* v. *Illinois Central*, 312 U.S. 630, 3/31/41, with jurisdiction based upon diversity, this Court held that the right of an employee to sue for wrongful discharge in a State Court did not depend upon exhaustion of remedies. And it was stated by this Court January 25, 1965, that the *Moore* v. *Illinois* case was not overruled (p. 657, fn. 14) by the opinion in *Republic* v. *Maddox*, 379 U.S. 650.

Donnelly v. *United*, 190 A.2d 825, Sup. N.J. 5/6/63, is another example of a State court properly working out the details of implementation of this Court's clear guidelines. The court held that a member could sue a Union for failure to process a claim of unlawful discharge under the grievance procedure, for *breach* of *contract*, where the Union acted arbitrarily in bad faith in refusing to demand arbitration; that the facts would be tested by federal law, citing

Smith v. *Evening News, supra*; that the States have concurrent authority in such instances (federal law being utilized), citing the *Dowd* case, *supra*; and that a guideline is that the Union must exercise the utmost good faith toward all employees, in carrying out the bargaining agreement.

The above case was followed in New Jersey, in *Independent* v. *Socony*, 197 A.2d 25, 32, and 205 A.2d 79, with holdings that the State Court, within the guidelines of the federal law had jurisdiction to hear labor actions, even though an unfair labor practice also appeared under Sec. 301, 29 U.S.C.A. 158, and 185.

Petitioners cite *Cortez* v. *Ford*, 84 N.W.2d 523, Sup. Mich. Here, a female member sued her Union and employer for a lay-off conspiracy to prefer males. It was held that the discretion of the Union could be challenged for bad faith, *arbitrary action* or fraud, and that the members may sue to enforce proper representation and the duty of fair representation under NLRA, Sec. 8, 29 U.S.C.A., Sec. 158.

In *Brandt* v. *U. S. Lines*, 246 F. Supp. 982, U.S. D.C. N.Y. 1/28/64, a member sued the employer and the Union to compel arbitration of his discharge. Again, the court referred to the guidelines of fair representation, measured by lack of arbitrariness, complete good faith and honesty of purpose in the exercise of the Union's sifting discretion, and other acts of representation.

These principles were stated in another case cited by petitioners, *Stewart* v. *Day*, 294 F.2d 7 (C.A. 5), the court citing this court in *Ford* v. *Huffman*.

Local 100, United v. *Borden*, 373 U.S. 690 and *Local 207, International* v. *Perko*, 373 U.S. 701, cited by petitioners, were fully differentiated from the instant case, in the opin-

ion of the Supreme Court of Missouri, pp. 45-47 of petitioners' Appendix. The short answer to them both is that they involve and were founded upon discrimination by unfair labor practices. Nowhere does this appear, top, side, or bottom, in the pleading, evidence or submission in the Owens (Sipes) case. On page 31 of petitioners' brief to the Kansas City Court of Appeals (quoted on page 9 of our red-covered Reply Brief in that court—forwarded herewith), petitioners admit: "There was *no showing* by Plaintiff that he was singled out for special *discriminatory* treatment by the Union."

The present case also involves an internal Union matter (as *Gonzales, supra,* and the Supreme Court of Missouri stress); petitioners confessed this below, when they stated in their Brief to the Kansas City Court of Appeals, page 32 (quoted on page 8 of our red-covered Reply Brief in that court—forwarded herewith) that the grievance procedure was an "*internal* and *contractual*" remedy. And, in addition to their acceptance of this verity, their officer and witness admitted the same thing in his testimony (see Respondent's Statement Supplemental to Petitioners').

CONCLUSION

Thus, in respondent's view, from the days of *Gonzales,* and earlier, this Court has given a yardstick and guidelines for the lower courts to follow, in the process of "litigating elucidation" of the details. They have followed such benchmarks in numbers of cases cited over the intervening years. No such cloudiness, confusion, "chaos", disaster, and destructions of our labor-management complex is apparent to anyone. It is perfectly proper, and in character, for this Court not to do the pick and shovel work, but to leave that for subordinate Courts, subject to your architectural plans.

This, the Supreme Court of Missouri has done, as have many other courts.

If petitioners wish to change, or particularize, the tried-and-true guidelines, it would seem that they have chosen a poor vehicle here, because the facts of the "outrageous" demand for $300.00, the arbitrary refusal by the officers to follow the decision of the Executive Board to go to arbitration, the clandestine dismissal of Owens' grievance in the 4th Step after arguing its merit, the admission by petitioners' Kobett that the Union might "twist" facts around, the confessions by petitioners' counsel that the facts showed an internal Union matter and no discriminatory treatment of Owens, the arbitrariness, lack of just cause, and legal malice found by the Supreme Court of Missouri in this internal breach of contract action, egregiously point up the wrongdoing as within the *Gonzales* guidelines set and maintained by this Court.

That these yardsticks for preserving the ancient premises of this Nation for retention of non-conflicting State jurisdiction are sound is emphasized in the quoted philosophy of one of the Justices of this Court, shortly before entry upon his duties here:

> "As the explosion of federal legislation and judicial decision affects more and more of the particulars and details of our life, we approach, I think, ever more closely to the limits of the effective capability of central government—of the Congress, the presidency and the federal agencies * * *. I am impressed by the possibility that there are limits to the vitality and effectiveness which we can secure through wholly or predominately federal machinery".

This case is one of detailed implementation of your declared principles, properly solved by the State Court, and not of the importance or type of which this Court has taken cognizance.

Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENT

Owens' employer has served upon Respondent an Amicus Curiae Brief.

The authors of this work admit that their client has no present or future financial exposure to Owens or his successor. Furthermore, although Respondent furnished them a copy of Petitioners' Brief, they have added nothing but predictions of calamitous events to petitioners' woeful forecasts along the same lines (which, strangely enough, have failed to materialize in the nine years since the *Gonzales* guidelines were set!) In short, in a rather unusual briefing partnership, their effort is patently to add the mere weight of numbers to the petitioners' arguments, the result to be that this small State case may be viewed in the perspective (completely distorted) of a world-shaking challenge to the Nation's labor-management relations as they exist today.

The one case cited which is not included in petitioners' Brief is *Black-Clawson* v. *International,* 313 F.2d 179 (1962, C.A. 2). This case held that an employee, as an individual, could not pursue his grievance through arbitration (emphasizing all the more that Owens needs protection of the courts against internal arbitrary and malicious breaches of a Union's fiduciary duty to its members of proper representation, under the bargaining agreement). The Court quoted from the District Court opinion in *Ostrofsky,* 171 F. Supp. 790; it is noted that the *Ostrofsky* opinion continues that an action may be filed by an employee "if the Union acted unfairly towards the employee in *refusing to press the employee's claim through to, and including arbitration* under the collective bargaining agreement", p. 791 (emphasis added).

CONCLUSION

It thus appears that the "scare headlines" feature of this Brief also are not based upon any substantial past experience or reasonable expectation for the future.

SECOND SUPPLEMENT

A preliminary typing of a second Amicus Curiae offering (by AFL-CIO) has just been received.

This too is a composite of gloomy forebodings as to the effect which the Missouri Court's interpretation would have upon the current labor scene. However, the facts set out in the opinion disclose arbitrary, unjust and malicious actions within the nine year old guidelines of *Gonzales*, where the backdrop is an "outrageous" demand for $300.00, overruling of the solemn vote by the Executive Board to go to arbitration, an officer of petitioners admitting "twisting" the facts, a case for arbitration with evidence top-heavy in Owens' favor (six doctors for him against two, opposed), and petitioners clandestinely withdrawing Owens' case after the Step Four hearing (a month before trial) notwithstanding a previously affirmative assertion that it was meritorious all along the line. The Brief buttresses itself with nothing but self-serving out-of-the record statements, references to articles in law school publications, and a report of a speech—none of which are either in this record, or admissible in the record of any court of law. Only one legal authority is presented, which petitioners have not cited: *Simmons* v. *Union News*, 15 L. Ed. 2d 125, 60 LRRM 2255 (10/18/65) (pet. for cert. to CADC den., Douglas dissenting in opinion). The action in this case substantiates Respondent's contention that this Court is leaving to the proper

bodies, the lower courts, the details of measuring, with this Court's yardstick, each set of facts as it appears in each particular case—"litigating elucidation". Certiorari likewise should be denied in the instant case.

In the figures cited in this Brief, it is certainly reasonable to assume that those *dropped* (percentage of the whole not stated) were not dropped under the tyrannical circumstances in evidence here; if they were, absence of a juridical remedy (a void which petitioners seek to create) with its punitive power to lash such wrongdoers—and to deter such potential tyrants—would serve to warm the nest for procreation of future despotically inclined representatives of the Union members. It is not without significance, in this connection, that in the two jury cases* tried by counsel for respondent, involving arbitrary and otherwise wrongful conduct of such officials, juries composed of predominately *Union members* believing that such action should be checked by courts, have voted Plaintiff the full amount in each instance. As to the bland suggestion by this Brief that a better remedy would be merely to reinstate the employee and give him back pay, this would serve merely to pardon egregious offenders —as in the present case—by eliminating the punitive features of a Court Action. Furthermore, as the "law's delays" wear on, the employee may, through the mental and physical stress of being long jobless, and for other reasons—become incapacitated for reinstatement. Thus, such a "remedy" would be sterile.

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*This case and *Morris v. Brotherhood*, 338 S.W.2d 777, Mo. Sup.

Here again, from the lack of proper substance in this Amicus Curiae Brief, one must once more conclude that its filing occurred principally in the interest of adding a group of snowflakes to the two now resting upon respondent's bough, in the fond hope that the weight of numbers will bear down the inherent strength of Respondent's upright posture.

Respectfully submitted,

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